Sarawak Machineries Trading Co & Anor v Sii Hing Kung & Ors

HIGH COURT (SIBU) — CIVIL APPEAL NO 12–16 OF 2001
CLEMENT SKINNER J
22 OCTOBER 2003

Landlord and Tenant — Rent — Double rent — Whether double the amount of the rent that was truly payable in respect of the premises which he continued to unlawfully occupy

Words and phrases — Civil Law Act 1956 s 28(4)(a) — 'double the amount of his rent'

The respondents (the plaintiffs) entered into a tenancy agreement with the appellants (the defendants) in respect of the whole of the ground floor of a shophouse for a term of five years commencing from 1 January 1988 to 31December 1992 at a monthly rent of RM1,200. By cl 5(d) of the tenancy agreement, the appellants were granted an option to renew the tenancy of the demised premises for a further term of 5 years at a rent of RM2,300 per month, provided always that the appellants exercised the option by giving 6 months' notice in writing of their intention to do so to the respondents. It is alleged by the appellants that by a letter dated 21 May 1992 the appellants' solicitors had given such notice of their intention to exercise their option. The respondents deny ever receiving any such letter from the appellants' solicitors. On the evidence the sessions court judge came to a finding of fact that the appellants had failed to give any notice to the respondents of their intention to renew the tenancy and awarded the respondents a sum of RM86,400 as mesne profit from 1 January 1993 up to 15 July 1995 which is for a period of 30 months 15 days, ie at amount of RM2,929 per month. Counsel for the appellants attacked the finding of the learned sessions court judge in having failed to consider adequately or to give sufficient weight to certain parts of the evidence led by the appellants on this issue, while giving too much weight to other aspects of the evidence led by or elicited through the appellants' witnesses. On the issue of the mesne profit payable, the appellants submitted that the words 'his rent' in s 28(4)(a) of the Civil Law Act 1956 must be interpreted as meaning 'his rent last paid' as that section only talks about 'double the amount of his rent', and since they were only paying RM1,200 at the effluxion of the tenancy, that is the amount on which double rent must be calculated under s 28(4)(a).

Held, dismissing the appeal but allowing the respondents' cross-appeal on mesne profits:

(1) The learned sessions court judge had in fact performed the primary task which the law entrusts upon her and in doing so she had not misdirected herself. The finding which the learned sessions court judge arrived at regarding the question whether or not the appellants had given notice of their intention to renew the tenancy, was, essentially, a finding of fact. It cannot be said that the delivery of the notice to an unknown person at the address stated in the notice, without even taking any steps to ascertain who that person was, was adopting a manner or

mode of service which a reasonable person, minded to bring the notice to the attention of the persons to whom it was addressed, would adopt (see paras 29, 41).

(2) With regard to the amount or quantum of mesne profits payable, the learned sessions court judge had erred in saying that the sum payable per month by way of mesne profits was RM2,929. She has not referred to any evidence upon which nor the basis on which, she came to the figure of RM2,929. The learned sessions court judge's decision on this issue cannot be supported and must therefore be set aside (see para 52).

(3) There was no good reason or justification for restricting the interpretation of 'his rent' in s 28(4)(a) of the Civil Law Act 1956 to mean 'his rent last paid', particularly so when s 28(4)(a) is not concerned at all with that period of time when a tenancy is still running; it is concerned with that period of time after a tenancy has come to an end ie 'after the determination of his tenancy', and 'until possession is given up'. The words 'with double the amount of his rent' must take their meaning from the context in which they appear. Since the section is concerned with that period of time when the tenant remains in possession of land or premises after the determination of his tenancy until he gives up possession of it, the words 'with double the amount of his rent' would logically mean that the tenant was to pay double the amount of the rent which he would have had to pay for the premises during the period that he holds over for, had he done so lawfully (see para 57).

(4) It would also be tantamount to rewarding a wrong doer for his own wrong because it would mean that in a case, such as the present, where on a renewal of a tenancy double the amount of the rent last paid becomes payable in respect of the renewed tenancy, a tenant who wishes to avoid paying the agreed higher rental can do so by simply and with impunity holding over and continuing in occupation at the end of the tenancy without bothering to renew it, safe in the thought that he can only be ordered to pay double of what he last paid and not double the amount of the rent that was truly payable in respect of the premises which he continued to unlawfully occupy (see para 58).

(5) The fact that the parties themselves had agreed that the rent for the demised premises during the term of any renewed tenancy would be RM2,300 per month, afforded good and reliable evidence of what the respondents could have let out the demised premises for during the period that the appellants held over and remained in possession (see para 56).

[Bahasa Malaysia summary

Responden-responden (plaintif-plaintif) membuat satu perjanjian penyewaan dengan perayu-perayu (defendan-defendan) berkenaan tingkat bawah sebuah rumah kedai untuk lima tahun bermula daripada 1 Januari 1988 ke 31 Disember

1992 pada sewa bulanan RM1,200. Melalui kl 5(d) perjanjian penyewaan itu, pearyu-perayu telah diberi satu opsyen untuk memperbaharui penyewaan premis demis untuk 5 tahun lebih pada sewa RM2,300 sebulan, dengan syarat bahawa perayu-perayu menggunakan opsyen dengan memberi notis 6 bulan bertulis niat mereka untuk berbuat demikian kepada responden-responden. Ia telah dikatakan oleh perayu-perayu bahawa melalui satu surat bertarikh 21 Mei 1992 peguamcara perayu-perayu telah memberi notis niat mereka untuk berbuat demikian. Responden-responden menafikan bahawa mereka pernah menerima surat seperti itu daripada peguamcara perayu-perayu. Pada keterangan, hakim mahkamah sesyen telah membuat keputusan fakta bahawa perayu-perayu telah gagal memberi notis kepada responden-responden mengenai niat mereka untuk memperbaharui penyewaan mereka dan mengawardkan responden-responden jumlah sebanyak RM86,400 sebagai hasil perantaraan daripada 1 Januari 1993 sehingga 15 Julai 1995 iaitu selama 30 bulan 15 hari, iaitu pada jumlah RM2,929 sebulan. Peguam untuk perayu-perayu menyerang keputusan hakim mahkamah sesyen yang arif kerana telah gagal mempertimbangkan dengan cukup atau gagal memberi kepentingan yang cukup ke atas bahagian-bahagian tertentu keterangan yang dikemukakan oleh perayu-perayu pada isu ini, sementara memberi kepentingan yang terlalu banyak kepada aspek-aspek lain keterangan yang dikemukakan oleh atau didapati daripada saksi-saksi perayu-perayu. Pada isu hasil perantaraan yang perlu dibayar, perayu-perayu telah menghujahkan bahawa perkataan-perkataan 'his rent' di dalam s 28(4)(a) Akta Undang-Undang Sivil 1956 mesti ditafsirkan sebagai 'his rent last paid' memandangkan bahawa seksyen itu hanya mengatakan mengenai 'double the amount of his rent', dan memandangkan bahawa mereka hanya membayar RM1,200 pada masa penyewaan itu luput, iaitu jumlah di mana sewa dua kali mesti dikira di bawah s 28(4)(a).

Diputuskan, menolak rayuan tetapi membenarkan rayuan balas responden-responden pada hasil perantaaan:

(1) Hakim mahkamah sesyen yang arif telah melaksanakan tugas utama yang telah diamanahkan kepada beliau dan semasa berbuat itu, beliau tidak salah arahkan dirinya. Keputusan yang dibuat oleh hakim mahkamah sesyen berkenaan persoalan sama ada perayu-perayu telah memberi notis niat mereka untuk memperbaharui penyewaan adalah keputusan fakta. Ia tidak boleh dikatakan bahawa penyampaian notis kepada seorang yang tidak diketahui di alamat yang ada di notis itu tanpa mengambil langkah untuk mengetahui siapa orang itu adalah menggunakan cara penyampaian yang seorang yang munasabah yang berniat membawa notis kepada perhatian orang yang dialamatkan akan menggunakan (lihat perenggan-perenggan 29, 41).

(2) Berkenaan jumlah kuantum hasil perantaraan yang perlu dibayar, hakim mahkamah sesyen yang arif telah khilaf di dalam mengatakan bahawa jumlah yang dibayar sebulanmelalui hasil perantaraan adalah RM2,929. Beliau tidak merujuk kepada keterangan di mana atau dasar di mana beliau sampaikan ke jumlah RM2,929. Keputusan hakim

mahkamah sesyen yang arif tidak dapat disokong dan perlu diketepikan (lihat perenggan 52).

(3) Tidak terdapat alasan yang baik atau justifikasi untuk membataskan tafsiran 'his rent' di dalam s 28(4)(a) Akta Undang-Undang Sivil 1956 untuk bermaksud 'his last rent paid', khusunya semasa s 28(4)(a) tidak berkenaan dengan tempoh masa apabila penyewaan masih berterusan; ia hanya berkenaan dengan tempoh masa apabila penyewaan itu berakhir iaitu 'after the determination of his tenancy', dan 'until possession is given up'. Perkataan-perkataan 'with double the amount of his rent' mesti mengambil maksudnya daripada konteks di mana perkataan-perkataan itu ada. Memandangkan bahawa seksyen itu berkenaan tempoh masa di mana penyewa masih di dalam milikan tanah itu sehingga beliau memberi milikan tanah itu, perkataan-perkataan 'with double the amount of his rent' akan bermaksud, secara logik, penyewa patut membayar dua kali jumlah sewa yang perlu dibayarnya untuk premis itu semasa tempoh yang beliau memegang lepas masa, jika beliau melakukannya mengikut undang-undang (lihat perenggan 57).

(4) Ia akan menjadi seperti memberi ganjaran kepada seorang pesalah untuk kesalahan sendirinya sebab ia akan bermaksud bahawa di dalam suatu kes, seperti kes kini di mana pada pembaharuan penyewaan sewa dua kali sewa yang telah dibayar perlu dibayar berkenaan penyewaan yang telah diperbaharui, seorang penyewa yang igin elak daripada membayar sewa yang lebih tinggi boleh membuat demikian dengan memegang lepas penyewaan bebas daripada hukuman dan terus menghuni tempat itu pada akhir tempoh penyewaan tanpa memperbaharuinya, dengan berpendapat bahawa beliau hanya dapat diperintah membayar dua kali jumlah apa yang beliau telah bayar dan bukan dua kali jumlah sewa yang sebenarnya harus dibayar berkenaan premis yang beliau terus menghuni melanggar undang-undang (lihat perenggan 58).

(5) Fakta bahawa parti-parti sendiri telah bersetuju bahawa sewa untuk premis demis selama tempoh pembaharuan penyewaan akan menjadi RM2,300 sebulan, menjadi keterangan yang baik dan dapat dipercayai mengenai jumlah yang responden-responden dapat menyewa premis demis itu selama tempoh perayu-perayu memegang lepas dan memegang milikan (lihat perenggan 56).]

Notes

For cases on double rent, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1349. For rents see 8 *Halsbury's Laws of Malaysia*, para [150.031].

Cases referred to

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352 (refd)
Jones v Marsh [1791] 4 TR 464 (refd)
N Hamid v *Perumal & Two Ors* [1951] MLJ 147 (refd)
Newborough (Lord) v Jones [1975] 1 Ch 90 (refd)

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395 (refd)
Thomas Tanham v John Armitage Nicholson [1872] LR Vol V 561 (refd)

Legislation referred to

Civil Law Act 1956 s 28(4)(a)

Appeal from: Civil Case Summons No SB/CS/55/93 (Sessions Court, Sibu)

Michelle Lau (Lau & Co Advocates) for the appellant.
Evin Ting (Robin Hii & Co Advocates) for the respondents.

Clement Skinner J:

Judgment

[1] This is the hearing of an appeal and a cross-appeal against the decision of the learned Sessions Court Judge, Sibu, who on 19 June 1999, after a full trial gave judgment in favour of the plaintiffs in the following terms:

(a) that the defendants pay the plaintiffs a sum of RM86,400 as mesne profit at RM2,400 per month for 36 months ie from 1 January 1993 to 31 December 1995 together with interest thereon at the rate of 8%pa from the date of judgment till full payment;

(b) that the rental deposit in the sum of RM6,000 paid by the defendants be forfeited to the plaintiffs.

[2] The defendants ('the appellants') being dissatisfied with the whole of the decision of the learned sessions court judge, bring this appeal.

[3] The plaintiffs ('the respondents'), on the other hand, being dissatisfied with the quantum or amount of mesne profits awarded to them, bring a cross-appeal against that part only of the decision of the learned sessions court judge.

[4] The facts leading up to this appeal and cross-appeal are these.

[5] The respondents are the registered co-proprietors of a shophouse at No 4 Jalan Khoo Peng Loong, Sibu ('the said shophouse'). On or about 29October 1987, the respondents entered into a tenancy agreement with the appellants in respect of the whole of the ground floor of the said shophouse ('the demised premises').

[6] The tenancy was for a term of five years commencing from the 1January 1988 to 31 December 1992 at a monthly rent of RM1,200.

[7] By cl 5(d) of the tenancy agreement, the appellants were granted an option to renew the tenancy of the demised premises for a further term of five years at a rent of RM2,300 per month, provided always that the appellants exercised the option by giving six months notice in writing of their intention to do so to the respondents.

[8] It is alleged by the appellants that by a letter dated 21 May 1992 written by their solicitors Messrs Lau & Co ('the appellants' solicitors') to the respondents, the appellants had given such notice of their intention to exercise their option.

[9] The respondents deny ever receiving any such letter from the appellants' solicitors. Some one and a half months before the expiry of the tenancy, ie on 12 November 1992, the respondents caused their own solicitors Messrs Robin Hii & Co ('the respondents' solicitors') to write to the appellants to remind them to surrender and yield up possession of the demised premises by 31 December 1992 as they (the appellants) had not exercised their option to renew the tenancy under cl 5(d).

[10] On or about 20 November 1992 the appellants' solicitors wrote on behalf of the appellants to the respondents' solicitors, insisting that the appellants had exercised their option to renew the tenancy through their (Messrs Lau & Co's) letter of 21 May 1992, but by a letter dated 26 December 1992, the respondents' solicitors wrote back denying that their (Messrs Lau & Co's) letter of 21 May 1992 had ever been received by the respondents.

[11] When the tenancy expired on 31 December 1992 the appellants refused to move out of the demised premises and continued in occupation thereof. Thereafter a series of letters passed between the solicitors acting for the parties with the appellants' solicitors forwarding cheques in payment of the monthly rentals on behalf of the appellants to the respondents' solicitors who, on behalf of the respondents, returned the rental cheques on each occasion, so that rentals for the months of January 1993 through to December 1994 were sent and returned in the manner described above.

[12] On 28 August 1993, the respondents commenced this action, claiming that the tenancy of the demised premises had expired by effluxion of time on 31 December 1992 but that the appellants had wrongfully remained in occupation as trespassers. Accordingly, the respondents prayed for the following relief against the appellants:

(i) possession of the demised premises;

(ii) mesne profits at the rate of RM4,000 per month from 1 January 1993 until possession be delivered up;

(iii) interest on the said mesne profits at such rate and for such period as the court deems fit,

[13] The appellants filed a defence claiming that they had, by their solicitors' letter dated 21 May 1992, exercised their right to renew the tenancy of the demised premises for a further term of five years by reason whereof a new tenancy at a monthly rental of RM2,300 had come into effect from 1 January 1993 on the same terms and conditions as the former tenancy agreement, and so they were in lawful occupation of the demised premises.

[14] By way of counter claim the appellants alleged that the respondents were in breach of cl 5(d) of the tenancy agreement by refusing to sign a new tenancy agreement to let the demised premises to them for a further five years commencing from 1 January 1993, and claimed the following relief:

(i) damages for breach of the said tenancy agreement;

(ii) a declaration that a new tenancy agreement subsisted between the appellants and respondents as they had complied with cl 5(d) of the tenancy agreement;

(iii) an order that the respondents enter into a new tenancy agreement with the appellants on substantially the same terms and conditions as the said tenancy agreement.

[15] Towards the end of 1994, the appellants decided to give up possession of the demised premises. On 12 December 1994, they caused their solicitors to write to the respondents' solicitors informing the respondents of their intention to quit and vacate the demised premises on 15 January 1995.

[16] On 16 January 1995, the appellants' solicitors wrote to the respondents' solicitors informing the respondents that the appellants had vacated the demised premises and enclosed in their letter a cheque in payment of the rental up to 15 January 1995, as well as the keys to the demised premises, but the appellants' solicitors' letter was only delivered to the respondents' solicitors' office on 17 January 1995. On that date, as the solicitor handling this matter on behalf of the respondents was away, his office refused to accept the appellants' solicitors' letter (and keys) and requested that the letter (and keys) be re-delivered on 19 January 1995 which the appellants' solicitors duly did on 20 January 1995. On 21 January 1995, the respondents' solicitors issued an acknowledgment for the keys but rejected the rental.

[17] At the hearing of this appeal, counsel for the appellants submitted that there are only three issues in this case:

(i) whether a notice was given by the appellants to renew the tenancy of the demised premises (the first issue);

(ii) if the court finds that a notice was not given, whether the respondents were entitled to claim for mesne profits and, if so, how much (the second issue);

(iii) if the court finds that a notice was given, whether the appellants were entitled to their counter claim (the third issue).

[18] With regard to the first issue, on the evidence led before her, the learned sessions court judge came to a finding of fact that the appellants had failed to give any notice to the respondents of their intention to renew the tenancy, as required by cl 5(d) of the tenancy agreement. Before I refer to the learned sessions court judge's finding, I will refer to the evidence that was led on the point in the court below.

[19] Evidence on behalf of the appellants was given by three witnesses, namely, Mr Wong Hee Hua ('DW1') who was a partner in the appellant firm, Mr Robert Lau Hui Yew ('DW2'), who was the lawyer in the appellants' solicitors' firm who prepared and signed the letter of 21 May 1992 addressed to the respondents, giving them notice of the appellants' intention to renew the tenancy ('the said notice') and En Sukare bin Ibrahim ('DW3') who was

at the material time the office boy at the appellants' solicitors' firm and the person who allegedly hand-delivered the said notice to an unknown person at No 4, (1st Floor) Khoo Peng Loong Road, Sibu on 21 May 1992.

[20] The evidence given by DW1 was that he intended to take a ten year tenancy in respect of the demised premises from the very beginning hence the initial term of five years with the option for a further five years as provided in cl 5(d), which clause was specifically requested by him. DW1 also said that before and after the said notice was written, he had asked the first respondent's son about the renewal of the tenancy when the latter came to collect the rentals but the first respondent's son kept saying he could not decide as it was up to his father (the first respondent). DW1 further said that a few days before 21 May 1992 he went to the legal firm of Messrs Lau & Co to request them to give written notice of the appellants' intention to renew the tenancy and that on 25 May 1992 he (DW1) received the appellants' copy of the said notice dated 21 May 1992 which was written to the respondents (see p 33 record of appeal, first line). The evidence shows that while the appellants occupied the ground floor of the said shophouse, the respondents continued to occupy the first floor of the said shophouse.

[21] The evidence given by DW2 on this issue is that on 21 May 1992 he wrote and signed the said notice, which was addressed to the respondents, 'all of No 4, (1st Floor), Khoo Peng Loong Road, Sibu', and gave it to DW3 to be hand-delivered to the respondents at the aforementioned address.

[22] DW2 also said that DW3 was a reliable office boy.

[23] DW3's evidence on the point is that on 21 May 1992 he was asked by DW2 to send a letter to No 4 (1st Floor), Khoo Peng Loong Road, Sibu, and so he went there and handed the letter to a man who took the letter, but he ('DW3') did not know the name of the person to whom the notice was delivered. DW3 also said he delivered a copy of the notice to No 4 Ground Floor, Khoo Peng Loong Road, Sibu but he did not say if it was delivered there on the same day as when the notice to the 1st Floor of No 4 Khoo Peng Loong Road was delivered. At the material time, DW3 had been working with the appellants' solicitors for five years. In cross-examination, DW3 said that MS Lau & Co maintained a despatch book, which the recipients of hand-delivered letters were asked to sign when acknowledging letters delivered to them. On the particular day in question, DW3 said that as DW2 had informed him that the said notice was urgent, he immediately proceeded to send the letter to No 4 Khoo Peng Loong Road, Sibu. According to DW3, he forgot to bring along the despatch book when he delivered the said notice to the respondent as DW2 had said the said notice was urgent and needed to be delivered immediately.

[24] DW3 was also asked in cross-examination:

Q: Did Mr Robert Lau tell you it was an important letter?

A: Yes, he did.

Q: Had you used the despatch book before for delivery of letters?

A: Yes.

Q: Do you agree that it is important to get acknowledgment of receipt for this sort of letter?

A: Yes, I agree.

[25] As far as the respondents are concerned, the first respondent Sii Hing Kung ('PW1') testified that neither he nor any of the other respondents received the said notice. PW1 was a holder of ¼ share in the said shophouse while his wife, the second respondent Wong Poh Ting owned a ¼ share, while their family company (of which PW1 was chairman), Sii Hing Kung & Sons Credit Sdn Bhd, the third respondent, owned the other ½ share in the said shophouse.

[26] In arriving at her decision on the first issue the learned sessions court judge said (at p 77 record appeal):

> In the circumstances, I would accept the evidence of the plaintiffs that no such notice to extend tenancy was ever served on the plaintiffs. The explanation given by DW3 as regards service of the notice (exh Dl) on an unknown person at the said address is rather dubious. In this case, the evidence of DW2 Robert Lau Hui Yew who prepared the letter (exh Dl) is that he did tell DW3 that the letter was very important. How could he have failed to bring along the despatch book although he admitted it was his usual practice to bring along despatch book for the recipient to sign the acknowledgment of receipt.

[27] Before me, counsel for the appellants attacked the above finding of the learned sessions court judge on several grounds.

[28] It was first said that the learned sessions court judge had failed to consider adequately or to give sufficient weight to certain parts of the evidence led by the appellants on this issue, while giving too much weight to other aspects of the evidence led by or elicited through the appellants' witnesses. Thus it was complained that while the sessions court judge had ignored evidence that:

(a) DW1 intended from the very beginning to obtain a long term tenancy and had taken steps to give effect to that intention by instructing Messrs Lau & Co to write to the respondents to exercise the option to renew;

(b) DW2 had done so;

(c) DW3 had said he had delivered the said notice to someone at the 1st Floor of No 4, Khoo Peng Loong Road;

[29] The learned sessions court judge had given too much weight to the evidence of DW3 that he did not bring along the despatch book and that he had delivered the said notice to an unknown person.

[30] I regret I find no merit in this complaint. It is apparent to me that what the appellants complain about here is the way in which the learned sessions court judge had evaluated the evidence that was placed before her on the issue at hand. In my judgment, she had in fact performed the primary task which the law entrusts upon her and in doing so she had not misdirected

herself. The finding which the learned sessions court judge arrived at regarding the question whether or not the appellants had given notice of their intention to renew the tenancy in accordance with cl 5(d) of the tenancy agreement, was, essentially, a finding of fact. In this regard I remind myself of the approach an appellate court should take with regard to findings of fact arrived at by a trial court. In *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395, the Court of Appeal said (at p 398):

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the trial court of the first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[31] Reverting to the facts of our case, I do not think the learned sessions judge had erred when she evaluated the evidence on the issue at hand before her. Whatever DW1's intentions may have been and whatever actions DW2 may have taken to give effect to DW1's intentions, the weight of such evidence would all come to nought if the said notice was not delivered to the respondents. Therefore, the evidence of DW3 was crucial to the case for the appellants. The learned sessions court judge had the opportunity of seeing and hearing DW3 give his evidence and having done so, decided that his claim to have delivered the said notice to some unknown person at the 1st Floor of No 4 Khoo Peng Loong Road, was dubious. It is my view that the learned sessions court judge was entitled, for the reasons she gave, to come to that finding, ie it was hard to believe that despite knowing that the said notice was important, and despite the fact that the legal firm maintained a despatch book for hand-delivered letters, and despite knowing that it was important to obtain an acknowledgment for the letter he was required to hand-deliver, DW3 would forget to take along the despatch book which was the very means by which delivery of the said notice could be substantiated. I would further add that as the said notice was addressed to the three respondents at the given address, it is improbable that a person with five years experience in hand-delivering letters would not want to know to whom he had delivered the notice to.

[32] It was also submitted on behalf of the appellants that there was other evidence to prove that the said tenancy had been renewed. It was said that such proof was provided by the fact that the appellants had not moved out of the demised premises but had consistently offered the increased rental of RM2,300. It was also said that if the tenancy had expired by effluxion of time, as claimed by the respondents, they would have refunded the rental deposit of RM6,000 to the appellants, which they did not do. Hence, the appellants say that this showed that the tenancy had been renewed. I regret I do not agree. The fact that the appellants continued to remain in occupation of the demised premises after the tenancy has expired and offered to pay the higher rental is an equivocal fact — it is equally consistent with the appellants remaining in occupation wrongfully. As regards the non-refund of the rental deposit, I do not see how it can be said that the only inference to be drawn

from this fact is that the deposit was retained by the respondents as the deposit for the new tenancy as otherwise it would have been refunded. The deposit was held as a security against unpaid rentals and other matters such as wrongful damage to the demised premises, which are matters that can only be ascertained when the appellants had vacated the demised premises and so nothing adverse should be read into the fact that the respondents had retained the RM6,000.

[33] It was also said that as the said notice was delivered to an unknown person at the 1st Floor of No 4 Khoo Peng Loong Road, the learned session court judge should have held that notice of the appellants' intention to renew their tenancy had properly been given to the respondents as the unknown person who received the notice must be presumed to be the servant or agent of the respondents which, in turn, it was said, constitutes strong presumptive evidence that the respondents had received the said notice even though the unknown person was not called to give evidence that he did not communicate the said notice to the respondents.

[34] I regret, I find no substance or merit in this contention. I cannot see on what evidential basis the appellants are able to say that it must be presumed that the unknown person to whom the said notice was allegedly delivered at the address stated in the notice, is the servant or agent of the respondents. It might have been open to the appellants to make such a submission if other evidence had been led through DW3 which suggest that this unknown person was an employee or servant of the respondents such as, for example, that the first floor of No 4 Khoo Peng Loong Road was an office and that this person was sitting behind a desk at the office. But no evidence of any sort was led from DW3 from which it might reasonably be inferred that the unknown person was a servant or agent of the respondents.

[35] The appellants also referred to several case authorities where it was held that service of a notice on a servant of the tenant constituted good service on the tenant himself. I regret that none of the cases referred to are of any assistance to the appellants here as they are clearly distinguishable on their facts.

[36] In *Jones v Marsh* [1791] 4 TR 464, the notice to quit was served on the servant of the tenant at his dwelling house and the contents of the notice were fully explained to the servant but she did not communicate it to the tenant. It was held that there was sufficient evidence from which the jury would have presumed that the notice reached the tenant.

[37] In *Thomas Tanham v John Armitage Nicholson* [1872] LR Vol V 561, the tenant was an imbecile. The notice to quit was served at the house of the tenant by delivery to his daughter who managed the house. She destroyed the notice. It was held that service of the notice to quit at the house of the tenant upon a person whose duty it was to deliver the notice to the tenant was sufficient — the presumption in such a case is that the notice did reach the tenant himself.

[38] In *N Hamid* v *Perumal & Two Ors* [1951] MLJ 147 it was held that a notice served on the servant of the tenant was properly served on the tenant even though in fact the notice was never received by the tenant.

[39] In *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352, it was held that notices to quit were validly served as they were left at the premises in the hands of the tenant's children.

[40] A common thread which runs through all the above four cases but which does not run through our case is that there was uncontroverted evidence in those cases that the notice was actually served on a person who was indisputably the servant or agent or close family member of the tenant and so there was a proper basis upon which the court could conclude that the notice had been received by the tenant. Here, it is just not possible to say that the unknown person was a servant or agent or a close family member of the respondents so that it might reasonably be said that they had received the notice.

[41] The appellants also referred to the case of *Newborough (Lord) v Jones* [1975] 1 Ch 90 which was a case in which the notice concerned was served in accordance with the statutory provisions in s 92(1) of the Agricultural Holdings Act 1948 which provided that 'Any notice under this Act shall be duly given to or served if it is delivered to him, or left at his proper address, or sent to him by post in a registered letter'. In that case the landlord had pushed the notice under the tenant's door but it was concealed under linoleum on the floor and remained there unknown to the tenant for five months. It was held that to serve a notice by leaving it at the proper address of the person to be served pursuant to s 91(1) of the Act of 1948 it must be left there in a manner which a reasonable person, minded to bring the notice to the attention of the person to whom it was addressed would adopt, and that in that case the landlord had adopted such a manner.

[42] I do not think the above case is of any assistance to the appellants. In the first place, service of the said notice in this case was not being effected in accordance with an agreed mode stated in the tenancy agreement itself. In the second place, I do not think that it can be said that delivering the notice to an unknown person at the address stated in the notice, without even taking any steps to ascertain who that person was, is adopting a manner or mode of service which a reasonable person, minded to bring the notice to the attention of the persons to whom it was addressed, would adopt.

[43] It was also said that the learned sessions court judge should have, but did not, treat with suspicion, the evidence of PW1 that neither he or the other respondents had received the said notice, especially so when the learned session court judge did not believe PW1 when he said that as the appellants had not given any notice of their intention to renew the tenancy, he (PW1) had entered into a tenancy agreement to let out the demised premises to a firm trading under the name and style of 'Poh Chuan Furniture', at a monthly rental of RM4,000. I regret I see nothing in this point. The fact that the learned session court judge did not believe PWTs evidence on one aspect of the case does not mean that she is not entitled to

believe his testimony on a different aspect of the case or that the whole of the evidence of PW1 had stood discredited.

[44] It was also said that the learned session court judge should have found that the appellants had given notice of their intention to renew the tenancy because PW1 had agreed, during cross-examination, that if letters are correctly addressed to No 4 Khoo Peng Loong Road, the respondents would have received them. It was submitted that since PW1 had agreed that No 4 Khoo Peng Loong-Road was the address of the respondents and that DW3 had said that he had delivered the said notice there, the appellants had sufficiently given notice of their intention to renew their tenancy. I regret I cannot agree with this submission. It proceeds on the basis or assumption that the said notice was actually delivered to the 1st Floor of No 4 Khoo Peng Loong Road which, as the learned sessions court judge found, was not a proved fact as she did not believe DW3's evidence on the point.

[45] It was also said that as PW1 and his wife, PW2 did not understand English the learned sessions court judge did not give sufficient weight to the very great possibility that when they received the said notice, they ignored it as they did not understand it. I regret I see nothing in this point because although PW1 said that he and PW2 did not understand English, he also said that he would not have ignored any letter in English he may have received, but would have referred it to his advocate. This is what he said on the matter in his cross-examination:

> Q: Is it possible you received this letter or your wife received it and you ignored it as you could not understand it?
>
> A: No, no such possibility that we received the letter and ignored it. If we really received the letter we would have referred the letter to our advocate.

[46] The answer given by PW1 above sufficiently demonstrates that the possibility which counsel for the appellants suggest would not have materialized for the reasons given by PW1. With that I now turn to consider the second issue.

[47] On the second issue, when the learned sessions court judge announced her decision immediately after the trial, she ordered that 'the defendants pay the plaintiffs a sum of RM86,400 as mesne profits at RM2,400 per month for 36 months ie from 1 January 1993 to 31 December 1995 together with interest thereon at the rate of 8%pa from the date of judgment till the date of payment.

[48] When commencing this action, the respondents had, in their statement of claim, prayed for 'mesne profits at the rate of RM4,000 per month from 1 January 1993 until possession be delivered up'. At the trial, the respondents led evidence in support of their claim for mesne profits through PW1 and one Tang Lee Hing (PW3), the proprietor of Poh Chuan Furniture, to the effect that when the appellants failed to give notice of their intention to renew the tenancy in accordance with cl 5(d), the respondents went ahead to let the demised premises to Poh Chuan Furniture and entered into a tenancy agreement for a term of three years at a monthly rental of RM4,000

from 1 January 1993. Evidence was also led through PW1 and PW3 to the effect that the respondents had accepted a rental deposit of RM8,000 from Poh Chuan Furniture but that when the appellants refused to vacate the demised premises at the end of their tenancy, the respondents were put in a position of breach of the new tenancy agreement entered into with Poh Chuan Furniture by reason whereof they had to refund the RM8,000 deposit as well as pay to Poh Chuan Furniture a penalty of RM16,000 as liquidated damages/compensation for not letting the demised premises to them.

[49] When the learned sessions courts judge came to give her grounds of decision, she refused the respondents' claim for mesne profits at RM4,000 per month and gave her reason for doing so. This is what she said:

> Now the mesne profits of RM4,000 per month claimed by the plaintiffs is based on the alleged tenancy agreement entered between PW1 and Poh Chuan Furniture. It is noted that alleged agreement was never tendered in court. This raises grave suspicion as to the actual existence of such an agreement. The allegation of payment of RM8,000.00 in cash by Poh Chuan Furniture to the plaintiffs for 2 months rental is also highly suspicious as the alleged receipt (ex P65) was not even properly discovered. Further the allegation of PW1 that he had refunded the deposit of RM8,000 to Poh Chuan Furniture and had to pay a sum of RM16,000 as liquidated damages/compensation is also suspicious as no concrete evidence to prove all these allegations.
>
> In the premises, I find that claim of RM4,000 mesne profits per month and damages RM8,000 as not proven by the plaintiffs and I therefore disallow the claim of RM4,000 per month and claim of RM8,000.

[50] Having rejected the basis upon which the respondents had claimed mesne profits of RM4,000 per month, the learned sessions court judge then went on to address the issue of mesne profits. This is what she said:

> I shall now deal with the amount of mesne profits that should be granted to the plaintiffs.
>
> Now, cl 5 of the agreement inter alia provides that if the tenancy was renewed for another term of five years, the rental would be at RM2,300 per month. Learned counsel for the defendant submitted that the value of mesne profits claimed by the plaintiffs should be calculated on the basis of double the value of rental at the date of determination of the tenancy (see s 28(4)(a) of Civil Law Act 1956). At the date of determination of tenancy, the rental was clearly RM1,200 per month and double that is RM2,400 which is very close to the agreed rental of RM2,300.
>
> In my considered opinion the mesne profits should be granted to the plaintiffs from 1 January 1993 up to 15 July 1995 which is for a period of 30 months 15 days ie at amount of RM2,929 per month which amount I consider as fair and reasonable. Thus the total mesne profits shall be at RM86,400.

[51] The learned sessions court judge then said in her grounds, that after the trial, when she awarded mesne profits to be paid from 1 January 1993 to 31 December 1995 (RM2,400 x 36 months), it was incorrect.

[52] The appellants as well as the respondents are unhappy with the decision of the learned sessions court judge on this part of the case in that:

(a) both parties say that there was no evidential basis upon which the learned sessions court judge could award RM2,929 per month as mesne profits; and

(b) as far as the period for which the mesne profits was payable, the appellants say that as they had vacated the demised premises on 15 January 1995, mesne profits were payable until that date only and not 15 July 1995 as ordered by the learned sessions court judge.

[53] With regard to the amount or quantum of mesne profits payable, Iagree with counsel for the appellants as well as with counsel for the respondents that the learned sessions court judge had erred in saying that the sum payable per month by way of mesne profits was RM2,929. She has not referred to any evidence upon which nor the basis on which, she came to the figure of RM2,929. The learned sessions court judge's decision on this issue cannot be supported and must therefore be set aside. But the question is, what is the correct amount of mesne profits payable?

[54] In this regard, s 28(4)(a) of the Civil Law Act 1956 reads:

> Every tenant holding over after the determination of his tenancyshall be chargeable, at the option of his landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not,

[55] Referring to the words 'his rent' in the phrase 'with double the amount of his rent' in the sub-section, it was the submission of counsel for the appellants that as 'his rent', ie the appellants' rent was RM1,200 at the date of effluxion of the tenancy, double that amount would be RM2,400. However, counsel said that as the parties had already agreed that the market rent for the demised premises in the event of a renewal of the tenancy would be RM2,300, that should be the amount of mesne profits payable. Counsel for the appellants accordingly urged me to award mesne profits at RM2,300 per month for 24 months 15 days, ie from 1 January 1993 to 15 January 1995, thereby making a total sum of RM56,350 payable by way of mesne profits to the respondents.

[56] Counsel for the respondents submitted, on the other hand, that there was sufficient evidence before the court to show that RM2,300 per month was the rent which the appellants would have paid for the demised premises during the period which the appellants had continued to occupy the same. That evidence is provided, said counsel, by the fact that the parties had themselves agreed that in the event the tenancy was renewed, the monthly rent would be RM2,300, and, the appellants had tendered that amount to the respondents throughout the period in question. So it was the submission of the respondents that double that amount would be RM4,600 per month.

[57] In my judgment the respondents are correct in their arguments regarding the amount of mesne profits payable. In my view, the fact that the parties themselves had agreed that the rent for the demised premises during the term of any renewed tenancy would be RM2,300 per month, afforded good and reliable evidence of what the respondents could have let out the

demised premises for during the period that the appellants held over and remained in possession. A

[58] I do not agree with the submission of the appellants that as s 28(4)(a) only talks about 'double the amount of his rent', and since they were only paying RM1,200 at the effluxion of the tenancy, that is the amount on which double rent must be calculated under s 28(4)(a). What the appellants B in effect submit is that the words 'his rent' must be interpreted as meaning 'his rent last paid'. I do not agree. I cannot see any good reason or justification for interpreting those words in such a restricted way, particularly so when s 28(4)(a) is not concerned at all with that period of time when a tenancy is still running; it is concerned with that period of time after a tenancy has C come to an end ie 'after the determination of his tenancy', and 'until possession is given up'. In my view the words 'with double the amount of his rent' must take their meaning from the context in which they appear. Since the section is concerned with that period of time when the tenant remains in possession of land or premises after the determination of his tenancy until he gives up possession of it, the words 'with double the amount of his rent' would D logically, in my view, mean that the tenant is to pay double the amount of the rent which he would have had to pay for the premises during the period that he holds over for, had he done so lawfully.

[59] Another reason for not agreeing with the appellants' submission is that if I accede to it, it would be tantamount to rewarding a wrong doer for E his own wrong because it would mean that in a case, such as the present, where on a renewal of a tenancy double the amount of the rent last paid becomes payable in respect of the renewed tenancy, a tenant who wishes to avoid paying the agreed higher rental can do so by simply and with impunity holding over and continuing in occupation at the end of the tenancy without bothering to renew it, safe in the thought that he can only be ordered to pay F double of what he last paid and not double the amount of the rent that was truly payable in respect of the premises which he continued to unlawfully occupy.

[60] I would accordingly set aside the order made by the learned sessions court judge on the amount of mesne profits payable to the respondents and G instead order that mesne profits in the sum of RM4,600 per month (ie double the amount of RM2,300), is payable by the appellants to the respondents.

[61] With regard to the period for which mesne profits are payable, I find that there was no basis for the learned sessions court judge to order the appellants to pay mesne profits until 15 July 1995. Section 28(4)(a) only H requires that mesne profits be paid 'until possession is given up'. The evidence shows that the keys to the demised premises were sent to the respondents' solicitors on 17 January 1995. In my view that should be regarded as the day possession of the demised premises was given up and it mattered not that the solicitor in charge of the matter on behalf of the respondents was not I available to take possession of the keys. I would accordingly award mesne profits at RM4,600 per month from 1 January 1993 until 17 January 1995, ie 24 months and 17 days thereby making a sum of RM112,922.60 payable

(there being 31 days in January). I would also award interest thereon at 8%pa from date of judgment to date of full payment.

[62] With regard to the sum of RM6,000 which the learned sessions court judge ordered to be forfeited to the respondents, I agree with the appellants that the learned sessions court judge did not give any reasons for making such an order. By cl 4(f) of the tenancy agreement if the appellants had during the term of the letting duly paid the rents reserved and observed and performed their covenants up to the expiration or sooner termination of the tenancy, the respondents became obliged to refund the deposit to the appellants. There is no evidence that the appellants had not paid the rents reserved or that until the tenancy was terminated they had not observed their covenants. There was no basis therefore for the learned sessions court judge to order a 'forfeiture' of the deposit. I accordingly order that it be refunded to the appellants.

[63] As I have upheld the finding of the learned sessions court judge that the appellants had not given notice of their intention to renew the tenancy of the demised premises to the respondents, it will not be necessary to address the third issue.

[64] In the result I make the following orders:

1 I dismiss with costs the appeal of the appellants against the decision of the learned sessions court judge that no notice of intention to renew the tenancy had been given by the appellants to the respondents;

2 I set aside the order forfeiting the sum of RM6,000 to the respondents and order that the amount be refunded to the appellants;

3 I allow the respondents' cross-appeal with costs and order that the appellants pay the respondents the sum of RM4,600 per month as mesne profits from 1 January 1993 to 17 January 1995 together with interest thereon at the rate of 8%pa from date of judgment till full payment.

Appeal dismissed but respondents' cross appeal on mesne profits allowed.

Reported by Sally Kee Seok Meng